

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
SOLYNDRA LLC, <i>et al.</i> ,)	Case No. 11-12799 (MFW)
)	
Debtors.)	Jointly Administered
)	Hearing Date: 1/23/12 @ 11:30 a.m.¹
)	Objection Deadline: 1/16/12²
)	Re: Dkt. No. 517

**OBJECTION BY WARN CLAIMANTS TO DEBTORS' MOTION FOR ORDER
APPROVING A KEY EMPLOYEE INCENTIVE PLAN AND AUTHORIZING
PAYMENTS THEREUNDER**

Peter M. Kohlstadt, on behalf of himself and a class of similarly-situated former employees of Solyndra LLC and 360 Degree Solar Holdings (collectively, the “WARN Claimants”), hereby files this Objection (the “Objection”) to the Debtors’ Motion For Order Approving a Key Employee Incentive Plan and Authorizing Payments Thereunder (the “Motion”).³ In support of this Objection, the WARN Claimants respectfully state as follows:

Objection

All Information Concerning the Proposed Bonus Payments Should be Made Part of the Public Record

¹ The Debtors seek relief pursuant to §363(b)(1) of the Bankruptcy Code. Rule 2002(a)(2) complements §363(b)(1), and requires 21 days’ notice for relief outside the ordinary course of the Debtors’ business. The Motion was filed on January 9, 2012 and sets January 23, 2012 as the hearing date. Although the Debtors expended additional estate money, and caused service to be effected by hand and overnight express mail, they still failed to provide 21 days’ notice as required by the Bankruptcy Rules.

²The Debtors’ calculation of the Objection Deadline also runs afoul of the Bankruptcy Rules. 7 days prior to the hearing date is January 16, which also is the Legal Holdiay, Martin Luther King Jr.’s Birthday. Bankruptcy Rule 9006(a)(1)(C) required the Debtors to roll the Objection Deadline forward one business day to January 17, 2012.

³ Unless defined herein, capitalized terms shall have the meanings ascribed to them in the Motion.

1. The Incentive Plan seeks to pay \$500,000 to the 21 Eligible Employees, disclaims that any recipient is an “insider,” but redacts the titles⁴ of all but 4 of the Eligible Employees. None of the Eligible Employees is identified by name. The disclosed titles, such as “senior manager” or “senior director,” suggest that the bonuses are intended for senior management. It is respectfully submitted that the Eligible Employees already are well compensated; all but 5 earn over \$100,000 per annum. The Incentive Plan identifies the “Date of Last Increase,” presumably meaning the last date that senior manager received a salary increase. The Petition Date was filed less than one year ago, on September 5, 2011. Reviewing the Date of Last Increase, it appears that 7 of the 21 Eligible Employees received very substantial base salary increases *post-petition*, ranging from 17-24%⁵ of their base salaries. *See* Motion at Exhibit A (Incentive Plan). Another 6 Eligible Employees received raises within the nine months prior to the Petition Date.

2. The WARN Claimants respectfully request that:

- (i) the full names and titles of the Eligible Employees be disclosed;
- (ii) the Debtors provide a short description of the Eligible Employees’ employment responsibilities including, specifically, if they have an employment agreement with the Debtors;
- (iii) the Debtors describe how the additional work the Eligible Employees are being asked to do is above and beyond their contractual/historical duties and how their contractual/historical duties may have *diminished* post-petition since the Debtors no longer are operational;

⁴ The term “insider” has been broadly defined by the Third Circuit to include, “non-statutory insiders.” *See Shubert v. Lucent Techs. (In re Winstar Communs., Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009) (“[I]n light of Congress’s use of the term ‘includes’ in § 101(31), courts have identified a category of creditors, sometimes called ‘non-statutory insiders,’ who fall within the definition but outside of any of the enumerated categories.” (internal citations omitted)). By holding back and/or redacting key information in the Motion about the Eligible Employees, it is impossible to determine if any Eligible Employee falls within the term “non-statutory insider.”

⁵ Query whether a 24% post-petition increase in salary is within the ordinary course of business pursuant to Section 363(b) of the Bankruptcy Code.

- (iv) the Debtors describe how the additional tasks senior managers are being incentivized to perform are directly related to the Performance Goals (i.e. are the Senior Managers negotiating the Plan or conducting the Auctions?); and
- (v) the Debtors identify the metric that will allow parties in interest to gauge whether the additional tasks performed by the Eligible Employees quantifiably enhanced the recovery to general unsecured creditors.

3. Over 1,000 of the Debtors' terminated employees are creditors of these estates. They are on the outside, looking in. Hands cupped around eyes, eyes pressed against the glass, they strain to see what is going on inside. But with this Motion, the Debtors have drawn the shades. Those on the inside have decided what is best for those on the outside.

4. The hallmarks of operating as a fiduciary in a chapter 11 bankruptcy case are disclosure and transparency. In insolvency, the Board's duty runs to its unsecured creditors. With this Motion, creditors are greeted with opaqueness, not clarity. What specific tasks are the bonus winners being incentivized to do? How does payment of a bonus directly translate into a measureable benefit for unsecured creditors? For senior managers already making six figure salaries, why is any bonus necessary as "additional motivation [?]" *id* at p.2. Why is a Plan necessary to conclude the straight liquidation of the Debtors' assets?

The Mere Filing of a Plan is Neither Performance nor a Goal

5. The first "performance" goal is that "the Debtors must *file* their Plan by no later than February 29, 2011 [sic]." Motion at ¶8 (*emphasis* added). The goal is illusory; the Plan that is filed: (i) could be later withdrawn, (ii) could be patently non-confirmable, (iii) could be subject to further material negotiation among parties such that a consensual Plan never is achieved or (iv) could provide for only a token recovery for general unsecured creditors. The filing of a Plan also does not mean it will be confirmed or ever become effective.

6. Based on the foregoing, the Board's decision to pay \$500,000 to senior management triggered by the mere filing of a Plan appears not to reflect sound business judgment. From the barebones description provided by the Motion, it appears the Incentive Plan rewards continued employment; it is not an "Incentive" Plan that rewards objectively verifiable performance. The Debtors should not be authorized to pay \$500,000 to select senior management for merely showing up and doing their jobs⁶.

7. The act of filing a Plan, by itself, fails as an *Incentive* Plan because it is not tied to achieving a measurable financial target. Without a metric that permits parties in interest to measure performance (e.g., achieving a certain sales price for assets or achieving a stated percentage recovery to general unsecured creditors, etc.), the proposed bonus appears calculated to achieve only the continued retention of the Eligible Employees, not their performance to achieve an objective benchmark.

8. Equally unclear from the proposed Incentive Plan is any description of how the additional work that will be performed by the Eligible Employees "is critical to filing the Plan ..." Motion at ¶6. In fact, the Motion fails to state how any of the Eligible Employees is making a direct contribution to the Plan or how that contribution is above or beyond their present job duties or obligations.

The Goal of Achieving "Compliance" is Ill Defined

9. The second "performance" goal is the "completion of tax, accounting and human resources compliance tasks and filings ("Compliance") for the calendar year 2011 by April 30, 2012" *Id.* at ¶6. This goal is ill-defined; the Motion is bereft of any description of what specific compliance tasks actually need to be completed, how those tasks are different from or in

⁶ In any evidentiary hearing on this Motion, the Court should also consider whether senior management actually has **less** work because the Debtors are not operational.

addition to the already existing duties or obligations of Eligible Employees, and how the completion of those tasks is directly linked to enhanced recovery for general unsecured creditors. Similarly, the act of “concluding the auctions or closing the private sales comprising the Sale by June 30, 2012 ...[,]” *id.*, is not tied to achieving a certain sales price, or other quantifiable benchmark that creates a recovery for general unsecured creditors.

10. Put bluntly, if the Plan/Sale is not going to actually result in a recovery for all creditors, these cases should be converted or dismissed now. This Court should not be used to oversee the liquidation of the secured creditors’ collateral for pennies on the dollar or as a forum to litigate the appropriateness of releases that corporate insiders seek as part of DIP Financing and, no doubt, will seek as part of a Plan/Sale Order. If the continued retention of the Eligible Employees inures solely for the sole benefit of the secured creditors whose collateral is being liquidated, or for corporate insiders seeking releases, then they should write the check for the bonuses.

The Debtors Have Failed to Demonstrate the Incentive Plan Reflects Sound Business Judgment

11. A debtor must provide sufficient evidence to support the fact that an employee bonus program represents the sound business judgment of the debtors. *In re Club Dev. & Mgmt. Corp.*, 27 B.R. 610, 613 (B.A.P. 9th Cir. 1982); *see also In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 156 (D. Del. 1999). A record consisting solely of counsel’s representations generally has been found to be insufficient to evidence the necessity of employee retention programs. *Club Dev. & Mgmt.*, 27 B.R. 612-613.

12. The Motion represents that “[t]he Debtors’ Board of Directors has considered and approved the Incentive Plan ...[,]” *id.* at ¶10 and further states “the Debtors have obtained

independent counsel from compensation consultants in formulating the Incentive Plan.” *Id.* at ¶30. Beyond those conclusory statements, the Motion fails to describe how the Board met its duty to inform itself of the soundness and appropriateness of the proposed Incentive Plan; e.g. what industry specialist developed the Plan; what criteria were used to determine which employees were “key” to achieving the Performance Goals; how are the Eligible Employees necessary to achieving a Plan/Sale (or, alternately, how will the Debtors not be able to file a Plan/sell their property if an Eligible Employee quits); how were the Performance Goals designed to achieve a measurable financial objective that benefits unsecured creditors; which professionals advised the Board; is the \$500,000 a modest amount compared to the expected return to general unsecured creditors; is the total cost of the Plan a net benefit or loss to the estate, etc.).

13. The proposed Incentive Plan does not satisfy the business judgment standard because, among other reasons, no evidence is offered in its support, just the blanket, unsubstantiated and anecdotal statements of counsel:

- “The Debtors believe that the approval of the Incentive Plan is in the best interest [sic] of their estates and will be necessary to maximize the value of the remaining assets.” Motion at p.2.
- “Within the past few months, the Debtors have experienced a serious loss of key personnel which has made the continuation of the sales process in an orderly fashion more difficult. The further loss of experienced personnel may seriously jeopardize the ongoing sales effort and, should it continue, require the engagement of experienced consultants at a much higher cost than maintaining the existing personnel.” *Id.* Noticeably absent is any evidence or description of the personnel that left, and, specifically, how their departure has made “the continuation of the sales process in an orderly fashion more difficult.” Creditors hoping to achieve a recovery on their claims have a right to know how the sales process has become “disorderly” and how the proposed payment of \$500,000 in estate funds, in the Board’s judgment, is the prudent course of action to restore “order” to the sales process. Without evidence, the spectre of “further loss of experienced personnel” is speculative, could be

alleged in every case, and therefore should not serve as the basis to pay \$500,000 to a select group of senior management.

- “[T]he Debtors believe that the Incentive Plan will motivate the Eligible Employees to work as hard as possible to achieve the Plan and Sale ... [T]he Debtors believe that such additional motivation is necessary pending the Plan and Sale because Eligible Employees’ best efforts are needed to achieve the filing of the Plan by February 29, 2012, the completion of tax, accounting and human resources compliance task and filings for the calendar year 2011 by April 30, 2012” *Id.* For the purpose of discussion, it is conceded that there is a correlation between paying someone a bonus and motivating them. The problem with the Incentive Plan is that the *goal* is only that: motivation. The *goal* instead should be the achievement of a quantifiable return to general unsecured creditors with senior management rewarded if that goal is met as objectively measured. Unless the Board without qualification can now state that spending \$500,000 and keeping these case going for another six months is going to benefit unsecured creditors, then the “additional motivation” offered to senior management serves no legitimate purpose. Further, the Incentive Plan fails to describe the relationship between the work the Eligible Employees will be doing during the performance period and the achievement of the Performance Goals. For example, what aspects of the Plan are the Eligible Employees working on?
- The Debtors acknowledgement in the Motion that they “drastically reduced their workforce from approximately 1,100 immediately prior to the Petition Date, to 84 ...” *Id.* at ¶6, confirms why the WARN Claimants have filed a complaint in these cases. That means there are over 1,000 former employees, mostly rank and file, are looking to obtain the most fulsome recovery possible from the administration of these cases under the Board’s stewardship. Although the Debtors’ statement might have been offered to suggest that the fortunate 84 who kept their jobs, and, in at least seven cases, received post-petition salary increase in a range from 17-24%, are working harder, it should be noted that ***the Debtors post-petition are not operational***, so workloads actually may have lessened. Although the Eligible Employees complain “that the clock is ticking on their employment by the Debtors and [they] will be likely to accept employment elsewhere absent the Incentive Plan ...[,]” the plight of choosing to remain employed without a bonus does not strike a sympathetic chord with the 1,000 plus employees terminated with little or no notice. In any event, justifying the bonuses based on the prospect of future unemployment is a circumstance that exists in every case, and, without specific evidence, cannot serve as the basis to pay a bonus.
- “[S]hould [the further loss of experienced personnel] continue, [it may] require the engagement of experienced consultants at a much higher cost than maintaining existing personnel.” Motion at p.2. Although it may be true that

hiring third parties will be more expensive than maintaining existing personnel, it is not apparent that that equation remains true when the \$500,000 bonus being offered to senior management is factored in.

The Proposed Incentive Plan Violates §503(c)(1) and)(3) of the Bankruptcy Code

14. From the statements made in the Motion with respect to the prospect of the continued loss of key personnel, coupled with what may charitably be described as soft Performance Goals, it appears that the Incentive Plan has the retention of the Eligible Employees as its primary purpose. Section 503(c)(1) is implicated if a transfer is made or an obligation incurred *for the benefit of an insider*. Absent a better understanding of the titles of the Eligible Employees, it is impossible to determine if any of them fall within the definition of a non-statutory insider. Providing \$500,000 in “additional motivation” to senior management to achieve a Plan/Sale, with no accompanying financial/sales target that benefits unsecured creditors, appears only to be in the best interests of senior management, the secured lenders and corporate insiders who may seek releases as part of that Plan. Unless the Debtors affirmatively agree now that any Plan that they file (that triggers bonus payments under the Incentive Plan) will not seek to release, exculpate, provide an injunction or otherwise benefit an insider, the Court should assume that the contemplated retention program for the Eligible Employees is for the benefit of insiders, and consider the proposal under the test enunciated in 503(c)(1), as well as the arguments set forth above.

WHEREFORE, for the reasons set forth above, the WARN Claimants respectfully request that the Motion be denied, and the Court grant such other and further relief as is just and proper.

Respectfully Submitted,

Dated: January 16, 2012
Wilmington, Delaware

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